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Nos. 380, 381 and 512

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*

v.

JOHN R. HANSEN and SHIRLEY G. HANSEN

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*

v.

BURL P. GLOVER

**On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

CLIFTON E. BAIRD and VIOLET L. BAIRD, *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE

**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## MOTION OF VANCE L. WILEY AND LUCILLE J. WILEY FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

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Vance L. Wiley and Lucille J. Wiley respectfully move the Court for leave to file a brief as *amici curiae*. The consent of the Solicitor General has been refused.

The applicants have an interest in these cases in that they now have pending in the Court of Appeals for the Sixth Circuit a petition for review of a decision of the Tax Court of the United States, *Vance L. Wiley, et al. v. Commissioner*, T. C. Memo. 1957-236 (presently scheduled for argument on April 21, 1959), in which the sole question involved is identical with *one* question which is *present* in one or more of these three cases, although not decided separately by the Court of Appeals in any of them, and not recognized as a separate question in the brief filed on behalf of the Commissioner of Internal Revenue.

There are two kinds of so-called "dealer reserves" (or components of one reserve, depending on the bookkeeping), one being sometimes referred to as a "holdback" and the other as a "finance reserve." From the standpoint of the money involved, the holdbacks in the three cases before the Court are of major importance. On the other hand, in applicants' case pending in the Court of Appeals for the Sixth Circuit, applicants had paid the tax on the holdbacks and are litigating only the taxability of the finance reserves.

Another case involving only the taxability of finance reserves, and not holdbacks, is *Arthur V. Morgan* v. *Commissioner*, 29 T. C. 63, now pending on petition for review in the Court of Appeals for the Ninth Circuit. Briefs and argument in this case have been postponed until decisions by this Court in the three instant cases have been rendered.

Since the taxpayers in the three cases now before this Court have little or no financial incentive (and, indeed, may regard it as contrary to their financial interest) to emphasize the distinction between holdbacks and finance reserves, which the Commissioner has ignored, applicants believe (and have been informed) that the distinction will not be adequately discussed by the parties. Nevertheless, the question is actually present on the facts, (as is recognized in Footnote 20 on page 47 of the Commissioner's brief) so that the decisions in these cases may well in-

fluence the decision in the *Wiley* case and the decision in the *Morgan* case by the Courts of Appeal for the Sixth Circuit and Ninth Circuit, respectively.

In an article entitled "New Developments in Tax Aspects of Accounting" by Arno Herzberg, CPA, 5 Journal of Taxation 280 (November, 1956), the author, after discussing holdbacks (which represent a portion of the purchase price of the automobile or trailer), says:

> "Then there is another kind of reserve. It is actually no reserve at all, although businessmen have become used to this term. It is a commission contingently credited to the dealer. Such a commission is a portion of the customer's finance charges allowed the dealer to induce him to sell contracts to the finance company. . . .
>
> "Holdbacks and reserves are thus entirely different. They involve, as we will see, quite different tax problems, although courts and authors have persistently called a reserve what was actually a holdback, and have quoted decisions on holdbacks in order to prove the taxability of reserves. In view of the many different items which accountants call reserves, it is not surprising that nonaccountants are confused."

To illustrate the confusion resulting from the failure or refusal of the parties to recognize the distinction between the two kinds of reserves, we refer the Court to page 54 of the brief filed on behalf of the Commissioner, where reference is made to a finance company's "losses arising out of defaults in, or acceleration of, the payments by purchasers." The Commissioner makes no distinction between these two kinds of so-called "losses." He assumes that a prepayment (or "acceleration" of the payment) of a note results in a "loss" to the finance company, presumably on the theory that when the principal is prepaid, the maker of the note is not required to pay the full amount of the finance charges originally included in the face amount of the note. It should be obvious, however, that this is not a true "loss" because neither the dealer, when

he receives the note from the purchaser, nor the finance company, when it purchases the note from the dealer, receives income in the amount of the unearned finance charges. The maker of the note conditionally agrees to pay them at maturity, but may avoid paying them by prepaying the principal. If income is not realized at the inception of the transaction, there is no "loss" upon prepayment, and *vice versa*.

The brief which applicants ask leave to file will be lodged with the Clerk of this Court so that it can be filed promptly if this motion is granted. The brief will present the arguments against the taxability of finance reserves from the standpoint of a dealer who is interested in that question alone and is not interested in the taxability of holdbacks.

Respectfully submitted,

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